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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD GIDEON HAMMOND,

Defendant and Appellant.

D074099

(Super. Ct. No. SCS290604)

APPEAL from a judgment of the Superior Court of San Diego County, Garry G. Haehnle, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Teresa Torreblanca and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Richard Hammond caused a fatal collision with a motorcyclist while driving his sedan 80 miles per hour the wrong way on a freeway with his headlights off in the dark. A subsequent blood test showed Hammond had smoked marijuana hours before the collision. A jury found him guilty of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)) and found true the allegation that he personally inflicted great bodily injury in the commission of the offense (Pen. Code, § 1192.7, subd. (c)(8)).¹ The trial court sentenced him to the upper term of six years.

Hammond raises two issues on appeal. First, he contends the trial court erred by denying his motion to suppress the results of the blood test that showed he had recently smoked marijuana. He maintains he lacked the capacity to voluntarily consent to the blood draw due to injuries he sustained in the collision and medication administered to him at the hospital. We conclude the trial court did not err.

Second, Hammond contends the trial court erred by imposing the upper term. He asserts the court disregarded mitigating factors and considered irrelevant or improper aggravating factors. We conclude Hammond forfeited his sentencing challenge by failing to raise it below; and even if the issue were preserved for appeal, we would find no abuse of the trial court's sentencing discretion.

¹ Further statutory references are to the Penal Code unless otherwise indicated. Although a great-bodily-injury finding may not be used to enhance the sentence on a current murder or manslaughter conviction (§ 12022.7, subd. (g); *People v. Cook* (2015) 60 Cal.4th 922, 934-935), the finding may be used to qualify the current offense as a "serious felony" for future purposes (*People v. Mohamed* (2016) 247 Cal.App.4th 152, 164-165).

Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Daniel R. lived in Tijuana and worked as a pizza delivery driver in National City. After working the night shift and helping to close the restaurant, Daniel headed home on his motorcycle around 4:30 a.m. on December 3, 2016.

Around that time, Hammond was driving southbound on Interstate 5 near the U.S.–Mexico border. At 5:12 a.m., a license plate reader at the San Ysidro port of entry captured images of Hammond driving a Mazda sedan in the dark without headlights on. Hammond then made a U-turn on the freeway and began driving north in the southbound lanes. Several witnesses called 911 to report seeing a vehicle driving the wrong direction on the freeway.

Hammond continued driving northbound in the southbound lanes without headlights and in excess of 80 miles per hour for about three minutes. During this time, he traveled about three miles, passed three freeway offramps, and encountered at least one car traveling southbound.

At about 5:18 a.m., when it was "still really dark," Hammond collided with Daniel, causing "an explosion like a ball of fire" that could be felt from the northbound freeway lanes. Daniel suffered multiple catastrophic injuries that led to "instantaneous death."

The collision caused Hammond to lose control of his car and collide with a pickup truck that Iris G. was driving southbound with her three children. Iris sustained ongoing back problems and her truck was "a total loss." Iris could not recall at trial whether

Hammond's headlights were on at the time of the collision, nor could she recall ever telling officers they were.²

CHP Officer Javier Mendoza, who was assigned to patrol the area where the collision occurred, arrived at the scene about 10 minutes after the collision. He saw fire department personnel gathered around Daniel, who was pronounced dead at the scene. Mendoza also saw that other law enforcement personnel had detained Hammond on the freeway median due to his reportedly erratic and uncooperative behavior. Based on the physical evidence at the scene, Mendoza concluded Hammond collided with Daniel nearly head-on while traveling the wrong direction.

Hammond was transported by ambulance to a hospital for evaluation and treatment of his injuries, which included a bump on his forehead and bleeding from his mouth and lips. Officer Mendoza rode in the ambulance with him. During this time, Mendoza observed several signs that Hammond was under the influence of a controlled substance: he was agitated and trembling; he had red watery eyes, and a white coating on his lips indicating a dry mouth; his heartrate was elevated; and his short-term memory was impaired. Based on these observations, Mendoza placed Hammond under arrest for suspicion of driving under the influence.

² A California Highway Patrol (CHP) officer who interviewed Iris after the collision testified at trial that his interview notes indicate Iris told him Hammond's headlights were on. Apart from these notes, the officer had no independent recollection of Iris's statement in this regard.

In the ambulance, Officer Mendoza conducted limited field sobriety testing on Hammond and obtained his consent to a blood draw.³ A toxicologist testified at trial that analysis of Hammond's blood sample indicated the presence of marijuana at levels higher than her lab typically sees, which indicated Hammond had recently smoked marijuana. The toxicologist explained marijuana can act as a stimulant, depressant, or hallucinogen, depending on the user. She also explained that marijuana can cause disorientation or confusion while driving, including that a driver "may not notice . . . if [his or her] headlights are on or off." The toxicologist added that the effects of marijuana can be felt "from a matter of hours to a period of days after use."

The prosecution charged Hammond with only a single count of vehicular manslaughter with gross negligence (§ 192, subd. (c)(1)), with the additional allegation that he inflicted great bodily injury in the commission of the offense (§ 1192.7, subd. (c)(8)). Hammond did not present an affirmative defense case, but instead argued that the jury should convict him only of the lesser included offense of vehicular manslaughter with ordinary (rather than gross) negligence. After deliberating for about an hour and a half, the jury found Hammond guilty of vehicular manslaughter with gross negligence, and found true the great bodily injury allegation. The trial court denied probation and sentenced Hammond to the upper term of six years in prison.

³ We discuss the circumstances regarding Hammond's consent to the blood draw in greater detail in part I.A., *post*.

DISCUSSION

I. Motion to Suppress Blood Test Results

Hammond contends the trial court erred by not suppressing his blood test results. He maintains he lacked the ability to provide informed consent to the blood draw in light of "the effects of the collision and the subsequent administration of antipsychotic medication." (Bolding and capitalization omitted.) We disagree.

A. Background

Hammond moved to suppress his blood test results, arguing he lacked the capacity to consent because he "sustained significant injuries from the accident," "was consistently rambling incoherent phrases," and "was sedated using the antipsychotic drug Haldol."

At the suppression hearing, Officer Mendoza testified he was dispatched at 5:17 a.m. on December 3, 2016, to respond to reports of a vehicle driving northbound in the southbound lanes of Interstate 5. En route, Mendoza learned the wrong-way vehicle had been involved in a collision. He also learned that a Border Patrol agent had arrived at the scene and was trying to detain someone (later identified as Hammond) who was behaving erratically. The erratic behavior included rambling, and running in traffic lanes while circling and attempting to enter and flee in a Border Patrol vehicle.

Upon arriving at the scene, Officer Mendoza saw that other officers had already detained Hammond in the center median. Hammond appeared agitated and did not want to remain still for the officers to ask him about the collision. Instead, "[h]e was rambling about other things."

Officer Mendoza observed signs that led him to believe Hammond may have been under the influence: Hammond appeared incoherent and "disoriented but [was] still able to communicate"; he asked questions that made no sense; and he was unable to provide a clear answer about whether there had been passengers in his car. Despite his suspicions, Mendoza did not conduct any field sobriety tests at the "chaotic" scene because he felt that doing so would pose "a safety issue."

Officer Mendoza observed that Hammond had sustained injuries consistent with being involved in a collision: he had "a large bump" on his forehead, likely from hitting the steering wheel, pillar, or airbag; he was bleeding from his lips and mouth; and his hands were cut. Medical personnel wanted to transport Hammond to the hospital for evaluation, so Mendoza rode with them in the ambulance.

In the ambulance, paramedics had difficulty restraining Hammond, who was trying to sit up. Even when Officer Mendoza told Hammond, "hey, just relax, we are going to get you to the hospital," Hammond "kept trying to sit up." Mendoza had to restrain him several times.

At times, Hammond behaved erratically in the ambulance: "he was looking at the roof of the ambulance and talking to an imaginary person named Dave"; he "mentioned something to the effect of the gravitational pull of the earth on his chest"; and he kept asking why Mendoza was helping him. Mendoza noticed Hammond's blood pressure and pulse were elevated.

Because of Hammond's refusal to "sit still" and the confines of the ambulance, Officer Mendoza was unable to administer common field sobriety tests. However, when

Mendoza asked Hammond if he would submit to a preliminary alcohol screening (PAS) test, "to [Mendoza's] surprise, [Hammond] understood and said, yeah, that he would."

Officer Mendoza testified that when he administers a PAS test he zeroes out the device; puts a mouthpiece on it; holds it up to the suspect; and has the suspect take a deep breath and "blow into [the device] consistently for six or seven seconds" as if "blowing out candles on a cake." Mendoza said "there [are] times in doing DUI investigations where suspects are not properly blowing into the device," either because they are "attempt[ing] to circumvent it by blowing faintly or sucking in," or because they "really don't understand," in which case he "ha[s] to explain it two or three times."

Before administering the PAS test, Officer Mendoza read Hammond an admonishment and informed him how to breathe into the device. Hammond successfully performed the PAS test and appeared to "understand what he was supposed to do"—"[h]e acknowledged it, understood it, performed it. [Mendoza] had no troubles with that." Hammond's ability to follow Mendoza's instructions satisfied Mendoza that Hammond had the "ability to understand what was going on." The result of Hammond's PAS test was negative for alcohol.

Although the PAS test result was negative, Mendoza believed Hammond was under the influence of a controlled substance and placed him under arrest. Consistent with his standard practice, Mendoza gave Hammond an "implied-consent" advisement. Ordinarily, this advisement informs the suspect he must elect between submitting to a breath test or a blood test. On this occasion, however, Mendoza modified the advisement by explaining to Hammond "that there wouldn't be an option of a breath test because

[they were] going to be in a hospital setting" without breath-testing equipment. Mendoza testified Hammond understood the advisement and "agree[d] to perform a blood test."

Upon arrival at the hospital, medical staff "experienced the same difficulty . . . communicating with [Hammond] and keeping him restrained," and administered Haldol, which Mendoza described as "some kind of a sedative."⁴ After receiving the dose, Hammond's "whole mood [and] behavior changed," and he "was in and out of sleep."

Officer Mendoza radioed dispatch to summon a mobile phlebotomist. The phlebotomist arrived and drew Hammond's blood around 7:00 a.m., while Hammond was sleeping.⁵ Mendoza testified that because Hammond "had already consented to the blood test," there was no need to "reread the implied consent admonishment" or to obtain a search warrant, which Mendoza estimated would have taken about 20 minutes. Mendoza reiterated his rationale on direct questioning from the court:

"[THE COURT:] Did you even consider getting a warrant for the blood draw, whether or not his consent could be valid, was it—everything you saw and heard coming out?

"THE WITNESS: Well, I did not think to get a warrant. I know I have to if—like if—were he already asleep or something. But he gave me an acknowledgment. I took it as valid being that he was

⁴ In their briefing, the parties variously characterize Haldol as a sedative, a relaxant, and an antipsychotic.

⁵ Officer Mendoza initially testified he was not sure whether Hammond was asleep during the blood draw. However, shortly after the hearing concluded, Mendoza consulted one of his reports and confirmed Hammond had been asleep. Mendoza notified the prosecutor, who advised the court. The court re-opened the hearing and allowed further examination of Mendoza on this point.

able to do the PAS test. He acknowledged it, understood it, performed it. I had no troubles with that."

Two minutes after the blood draw, Hammond was advised of and waived his *Miranda*⁶ rights. When Officer Mendoza asked whether he had any drugs or alcohol in his system, Hammond responded, "Just marijuana." During the interview, Hammond located and showed Mendoza a text conversation on his phone indicating who he had been with before the accident.

After hearing argument, the trial court denied Hammond's suppression motion, finding "the totality of the circumstances as [to] the voluntariness of the consent and the free nature of the consent . . . outweigh[ed] any of Mr. Hammond's confusion or noncoherent statements that he had made in the ambulance or at the scene and that overrides it and it does show that this consent was freely and voluntarily given." Specifically, the court cited (1) the fact "there was no coercion or duress, any force of threats . . . or force used" when Officer Mendoza gave the implied consent advisement, to which Hammond expressly responded in the affirmative; (2) Hammond's comprehension and successful completion of the PAS test, "which was not the officer's experience with all people trying to complete the PAS"; (3) immediately after the blood draw, Hammond waived his *Miranda* rights and spoke coherently to Mendoza; and (4) Hammond was able to manipulate and operate his cell phone.

⁶ *Miranda v. Arizona* (1966) 384 U.S. 436.

B. Relevant Legal Principles

The Fourth Amendment prohibits "unreasonable searches and seizures." (U.S. Const., 4th Amend.) A "warrantless search is per se unreasonable unless the People prove that the search comes within a recognized exception to the warrant requirement." (*People v. Meza* (2018) 23 Cal.App.5th 604, 609-610; see *Katz v. United States* (1967) 389 U.S. 347, 357.) "A blood draw is a search under the Fourth Amendment." (*Meza*, at p. 610; *Birchfield v. North Dakota* (2016) ___ U.S. ___, [136 S.Ct. 2160, 2173].)

"It is 'well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.' " (*People v. Woods* (1999) 21 Cal.4th 668, 674; see *People v. Harris* (2015) 234 Cal.App.4th 671, 685 (*Harris*).) " 'To be effective, consent must be voluntary.' " (*Harris*, at p. 689.) " '[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.' " (*Ibid.*; see *People v. Gutierrez* (2018) 21 Cal.App.5th 1146, 1152 [preponderance of evidence applies to prosecution's burden in opposing suppression motion].)

" 'The voluntariness of consent is a question of fact to be determined from the totality of circumstances.' " (*Harris, supra*, 234 Cal.App.4th at p. 690.) Voluntariness " 'is to be determined in the first instance by the trier of fact; and in that stage of the process, "The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all

presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence." ' ' ' (*People v. Monterroso* (2004) 34 Cal.4th 743, 758; see *Harris*, at p. 690.)

C. Analysis

We find no error in the trial court's conclusion that the totality of circumstances show that Hammond validly consented to the blood draw.

First, Officer Mendoza testified he gave Hammond a modified version of the implied consent admonishment, to which Hammond responded by expressly granting his consent to a blood draw. The court found there was nothing coercive or threatening about the manner in which Mendoza delivered the advisement. This finding is consistent with case law generally holding that delivery of the implied consent advisement, in and of itself, is not coercive for purposes of vitiating consent. (See *Harris, supra*, 234 Cal.App.4th at p. 689 ["[t]hat the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment"].)

Second, the trial court relied on Officer Mendoza's testimony that Hammond "appear[ed] to understand" the implied consent admonishment when granting his consent. As Mendoza explained in response to direct questioning from the court, he "took [Hammond's consent] as valid being that [Hammond] was able to do the PAS test." The trial court found Hammond's comprehension and successful completion of the PAS test

significant because it "was not the officer's experience with all people trying to complete the PAS."

Hammond contends the trial court erred in concluding these indicia of consent outweighed the countervailing considerations he invokes—his erratic postcollision behavior and the fact he was given Haldol at the hospital. We are not persuaded.

Undeniably, Hammond *at times* exhibited erratic behavior at the crime scene and in the ambulance. He appeared agitated, ran in traffic lanes around a border patrol vehicle and tried to flee in it, rambled incoherently, talked to imaginary people, commented on gravitational pull, and wondered why Mendoza was helping him.

But it is equally undeniable that Hammond *at other times* exhibited lucid behavior. Critically, the trial court found that these intermittent periods of lucidity occurred when Hammond dealt with Mendoza on matters of import—the PAS test, the implied consent admonishment, and the granting of consent.

Third, the trial court could reasonably conclude that any injuries Hammond sustained in the collision did not interfere with his ability to voluntarily consent to a blood draw. The only evidence of any injuries is Officer Mendoza's testimony that he saw a bump on Hammond's forehead, blood in his mouth, and cuts on his hands. We decline to speculate, in the absence of evidence, that these injuries were sufficient to preclude Hammond from giving voluntary consent. (See, e.g., *People v. Vannesse* (2018) 23 Cal.App.5th 440, 448 [rejecting defendant's claim that post-blood-draw loss of consciousness negated voluntariness of consent because there was no evidence of incapacitating injury], rev. gr. Aug. 29, 2018, No. S249428.) If anything, the fact

Hammond was able to manipulate his phone at the hospital after being given Haldol suggests his earlier erratic behavior was *not* the result of physical injuries, but of some other cause.

Contrary to Hammond's contention, his circumstance does not "mirror[] the situation found in" *Mincey v. Arizona* (1978) 437 U.S. 385, in which the suspect was in a hospital intensive care unit; in " 'unbearable' " pain from being wounded in a shootout with police that left him partially paralyzed; had tubes inserted in his throat, nose, and arm to help him breathe, prevent him from vomiting, and feed him intravenously; his bladder was catheterized; and police questioned him for nearly four hours, even after he repeatedly asked that the interrogation stop until he could get a lawyer. (*Id.* at pp. 396, 398.)

Nor, as Hammond contends, was his physical or mental impairment in any way comparable to that of the suspect in *Reck v. Pate* (1961) 367 U.S. 433, who was a mentally impaired 19-year-old who was physically ill and in pain, whom police, "for all practical purposes, held incommunicado" for four days while they questioned him without providing adequate nourishment or legal counsel. (*Id.* at pp. 435-442.) By contrast, 27-year-old Hammond consented to a blood draw after about only one hour of interacting with Officer Mendoza, during which time Mendoza and medics were tending to him.

Alternatively, Hammond argues that the fact that Mendoza "did not seek or obtain [Hammond]'s purported consent to the blood test until after he was given [Haldol], is critical" But this critical argument is based on a misunderstanding of the record.

Officer Mendoza repeatedly testified that Hammond consented to the blood draw while in the ambulance, *before* hospital staff administered the Haldol. Thus, the Haldol could not have influenced Hammond's consent.

Under the totality of these circumstances, the trial court did not err in denying Hammond's suppression motion.

II. *Imposition of Upper Term*

The sentencing triad for a felony conviction of vehicular manslaughter with gross negligence is two, four, or six years in prison. (§§ 192, subd. (c)(1), 193, subd. (c)(1).) Hammond contends the trial court erred in selecting the six-year upper term because the court improperly (1) "ignored the numerous mitigating factors"; (2) "disregarded the probation officer's recommendation" of the middle term; and (3) "relied on factors that were either irrelevant," such as Hammond's marijuana use prior to the collision, "or demonstrably improper," such as "the vulnerability of the victim." The Attorney General counters that Hammond forfeited these contentions by failing to raise them at sentencing, when the trial court could have clarified its sentencing rationale. We agree Hammond forfeited these contentions. And even if he had not, we would find no abuse of the trial court's exercise of its sentencing discretion.

A. *Background*

Hammond filed a mitigation statement arguing he was eligible for and should be granted probation based on his mental health issues, family history, professional accomplishments, remorse, and lack of a criminal record. He requested that he be sentenced to the middle term of four years, stayed, and placed on probation.

The prosecution filed a sentencing memorandum requesting that the court impose the upper term of six years. The prosecution argued Hammond was presumptively ineligible for probation because he personally inflicted great bodily injury. (§ 1203, subd. (e)(3).) As circumstances in aggravation, the prosecution cited, among other things, the facts that (1) Hammond, "*with marijuana in his system*," (italics added) "drove the wrong way on I-5 into oncoming traffic for [three] miles without headlights";⁷ and (2) "the unsuspecting victim . . . was . . . riding his motorcycle" ⁸

The probation officer filed a report recommending the court deny probation and impose the middle term of four years. The report stated Hammond had no prior convictions, was engaged to his pregnant fiancée, and expressed remorse. One of Hammond's friends told the probation officer he was with Hammond shortly before the collision, and "described Hammond as distraught and crying" The friend also said Hammond smoked marijuana about four hours before the collision, which Hammond confirmed to the probation officer. Another friend told the probation officer that Hammond looked " 'So fucking tired' " from being "extremely sleep deprived" while

⁷ The prosecution cited this in connection with rule 4.421(a)(1) of the California Rules of Court, which identifies the following circumstance in aggravation: "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." All further rule references are to the California Rules of Court.

⁸ The prosecution cited this in connection with rule 4.421(a)(3), which identifies the following circumstance in aggravation: "The victim was particularly vulnerable."

taking care of his mother, whom he had recently "rescued . . . from a nursing home."

Hammond "denied having any psychological problems."

At the outset of the sentencing hearing, the trial court advised the parties it had read and considered the mitigation statement (and supporting letters), the prosecution's sentencing memorandum, and the probation report. The court then heard from Daniel's relatives (who requested that the court impose the upper term) and Hammond's fiancée and a friend (who requested that the court exercise restraint).

Defense counsel acknowledged the trial "[c]ourt has been given discretion to issue the sentence of probation or up to . . . six years in state prison." But counsel urged the court not to waste Hammond's life just because Daniel's had been wasted—"what happens six years from now is dependent largely on the Court's decision here this morning."

Before pronouncing sentence, the trial court stated, "I have read and considered and heard everything that went on today in this courtroom." Beginning with probation, the court found there were no unusual circumstances that warranted disturbing the presumption of ineligibility. To the contrary, the court noted Hammond "chose to smoke marijuana" and "get behind the wheel of a car." The court also noted the lack of any "evidence at all that mental health was at issue in this case."

In terms of selecting a sentence, the court noted "there are some good things, mitigating aspects to Mr. Hammond's life," such as the fact he runs a business and has "a fiancée that's pregnant." "But in the end run," the court reasoned it needed "to look at . . . factors affecting this crime." The aggravating factors that "just st[ood] out in [the court's]

mind" were that (1) the "crime did involve a great deal of violence"; (2) Hammond chose to drive after smoking marijuana, when he was either "under the influence for purposes of driving," or when his "ability to think and see things clearly" was affected; and (3) "the victim was very vulnerable" because he "was riding a motorcycle, which is smaller than a car, unsuspecting that somebody was coming north in this case, and a couple thousand pound vehicle head-on into the motorcycle that made that particular victim Daniel very vulnerable." Based on these aggravating circumstances, the trial court imposed the six-year upper term.

The court then asked about setting a restitution hearing. Defense counsel stated Hammond would waive his right to be present. Counsel did not object to the sentence imposed or inform the court it had relied on irrelevant or improper sentencing factors.

B. *Forfeiture*

We conclude Hammond forfeited his sentencing challenge by failing to assert it during the sentencing hearing. "A party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' if the party did not object to the sentence at trial." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751, quoting *People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*).) This forfeiture rule applies to "cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Scott*, at p. 353; see *Gonzalez*, at p. 751.) "The reason for [the forfeiture] rule is that "[i]t is both unfair and

inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided." ' ' " (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1101 (*Sperling*)).) However, the forfeiture rule applies only when the sentencing court provides "a meaningful opportunity to object . . . during the course of the sentencing hearing itself" (*Scott*, at p. 356.)

Hammond's sentencing challenge falls squarely within the forfeiture rule. Specifically, his challenges to the trial court's balancing of mitigating and aggravating factors and consideration of purportedly irrelevant and improper aggravating factors are precisely the types of issues forfeited if not raised during the sentencing hearing. (See *Scott, supra*, 9 Cal.4th at pp. 353, 356.)

We are unpersuaded by Hammond's assertion that he preserved his sentencing challenges by arguing he "should be given the low term, or even probation." His advocating that the court *should* exercise its discretion *in one manner* is a far cry from arguing the court *cannot* exercise it *in another*. (See *Sperling, supra*, 12 Cal.App.5th at p. 1101 [requesting probation or lower term does not preclude forfeiture].) Indeed, far from advising the trial court it *lacked* the authority to impose the upper term, Hammond's counsel *twice* acknowledged during the sentencing hearing that the court *possessed* such authority.

We are likewise unpersuaded by Hammond's assertion that he was not provided a meaningful opportunity to object during the sentencing hearing because "the court did not announce its tentative sentencing decision before counsel argued their respective positions." First, announcing a tentative decision is not a prerequisite to applying the

forfeiture rule. (*People v. Zuniga* (1996) 46 Cal.App.4th 81, 84 [" 'meaningful opportunity to object' " does not "require a tentative ruling in advance of the actual sentence"].) Second, the prosecution's sentencing memorandum gave Hammond notice of the need to object to the purportedly improper aggravating factors. Finally, Hammond had a meaningful opportunity to object during the sentencing hearing when the court sought counsel's input on the restitution hearing. (See *Sperling, supra*, 12 Cal.App.5th at pp. 1101-1102 [challenge forfeited where counsel "remained silent" after the trial court pronounced sentence and asked, " 'Is there any other record either of you would like me to make?' "].)

For these reasons, Hammond forfeited his challenge to the trial court's imposition of the upper term sentence.⁹

C. No Abuse of Sentencing Discretion

Even if Hammond had not forfeited his sentencing challenge, we would find no abuse of discretion in the trial court's selection of the upper term.

⁹ In a *footnote* in his *reply brief*, Hammond argues in conclusory fashion that any forfeiture of his sentencing challenges was the result of ineffective assistance of counsel. We decline to consider this improperly raised contention. (See *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 380, fn. 16 [declining to consider issues in briefs not listed " 'under a separate heading or subheading,' " as required by rule 8.204(a)(1)(B)]; *Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017) 18 Cal.App.5th 881, 884, fn. 2 [issue forfeited where first raised in reply brief]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1245, fn. 14 [issue forfeited where not supported by "cogent argument with specific citations to the record"].)

1. *Relevant Legal Principles*

In selecting a sentence, "[t]he midterm is statutorily presumed to be the appropriate term unless there are circumstances in aggravation or mitigation of the crime." (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583, citing former § 1170, subd. (b) & former rule 420(a), now rule 4.420(a).) " 'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" [citation].' " (*Id.* at p. 1582.) "[A] single factor in aggravation suffices to support an upper term" (*People v. Osband* (1996) 13 Cal.4th 622, 730), and the " 'trial court may minimize or even entirely disregard mitigating factors without stating its reasons' " for doing so (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637; see *Avalos*, at p. 1583).

" 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

2. Analysis

Hammond has not met his burden of showing the trial court abused its discretion by concluding the balance of mitigating and aggravating factors justified selecting the upper term.

The record affirmatively demonstrates the trial court considered Hammond's mitigation evidence. The court stated twice during the hearing that it had read and considered the mitigation statement and the probation report;¹⁰ the court expressly acknowledged "there are some good things, mitigating aspects to Mr. Hammond's life"; and the court specifically explained why it found certain of the mitigation evidence unpersuasive. This fulfilled the trial court's duty to *consider* Hammond's mitigation evidence.

The record also shows there was at least one valid aggravating factor justifying the upper term—Hammond's use of marijuana before the collision. Abundant evidence (e.g., toxicology results, Officer Mendoza's testimony, and statements made to the probation officer) supports the trial court's factual finding that Hammond used marijuana before the collision. And the toxicologist's testimony about marijuana's effects (disorientation or confusion while driving) and their duration (hours to days) support the trial court's finding that Hammond's marijuana use was a contributing factor to the collision. The

¹⁰ The fact the trial court disagreed with the probation officer's report is of no moment. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 366 [probation officer's report and recommendation "are advisory only, constituting aids to the sentencing court in its exercise of discretion in determining an appropriate disposition, *and thus may be rejected in their entirety*"], italics added.)

trial court expressly stated it relied on this "clear" testimony when concluding marijuana, at a minimum, "affect[ed] [Hammond's] ability to think and see things clearly."

Hammond contends it was improper for the trial court to consider his marijuana use an aggravating factor because doing so "had the practical effect of [convicting] and sentencing [him] for an offense with which he had not been charged"—vehicular manslaughter with gross negligence *while intoxicated* (§ 191.5, subd. (a)). This contention lacks merit. "[W]here the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence." (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562 [trial court properly considered malice—an element of second degree murder—an aggravating factor in selecting the upper term on a conviction for vehicular manslaughter with gross negligence].) Thus, because marijuana use is not an element of vehicular manslaughter with gross negligence, the trial court could properly consider it an aggravating factor.

Because the trial court considered (but discounted) Hammond's mitigation evidence and found it was outweighed by at least one valid aggravating circumstance, the trial court did not abuse its discretion in selecting the upper term of six years.¹¹

¹¹ Because we conclude the trial court's selection of the upper term was supported by one valid aggravating factor, we need not determine the validity of the other aggravating factors the trial court cited. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1759 [error in considering invalid aggravating factor is harmless if "there remains one unassailable valid factor in aggravation"].)

DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

DATO, J.